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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1970

NO. 380

M/S KLAUS OLDENDORFF, her engines boilers etc., in rem, and
EGON OLDENDORFF, in personam,
Petitioners

vs.

POTASH IMPORT AND CHEMICAL CO.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondent

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

M/S KLAUS OLDENDORFF, her engines, boilers etc. in rem, and Egon Oldendorff, in personam respectfully pray that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit, entered in this cause on March 4, 1969 and order denying petition for rehearing which order was entered on April 10, 1970.

OPINIONS OF THE COURT BELOW

The opinion of the District Court for the Eastern District of Virginia, rendered on July 30, 1968, is unreported but is printed as Appendix A. infra. pp._____

The original opinion of the Court of Appeals for the Fourth Circuit, rendered on March 4, 1969 is not reported in West but is reported at 1969 AMC 361 and is printed as Appendix B, infra, pp._____

Upon Petition for Re-Hearing, an order was entered denying the petition on April 10, 1970. That order is printed as Appendix C, infra. pp_____

JURISDICTION

The order of the Court of Appeals denying Petition for Re-Hearing was entered on April 10, 1970, Appendix C., infra. pp._____. The jurisdiction of this Court is invoked under 28 USCA §1254 (1)

STATEMENT OF THE CASE

The petitionef, Egon Oldendorff, hereinafter referred to as the shipowner, is a citizen of the Federal Republic of West Germany and owner of the vessel KLAUS OLDENDORFF. The respondent, Potash Import and Chemical Company, hereinafter referred to as the charterer, is an American corporation engaged in the importation into the United States of potash in bulk.

On March 10, 1966, the charterer and shipowner executed a charter party for the shipowner's vessel, KLAUS

OLDENDORFF, to carry potash from Germany to east coast ports of the United States. The charter party executed by the parties in its second clause, contained the following language:

> Owners are to be responsible for loss of or damage to the goods . . . *only* in case the loss . . . has been caused by improper or negligent stowage of the goods : . . or by personal want of due diligence on the part of the Owners or their manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their manager.
>
> And the owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the Captain or crew or some other person employed by the Owners on board or ashore for whose acts they would but for this clause, be responsible, *or from unseaworthiness of the vessel on loading or commencement of the voyage of* or at anytime whatsoever.

On March 22, 1966 the KLAUS OLDENDORFF sailed from Germany with a cargo of potash arriving at Wilmington, North Carolina April 7, 1966.

Following arrival at Wilmington, discharge of the potash cargo commenced and proceeded without event until April 11, 1966, when it became necessary to flood the vessel's bottom tanks (ballast tanks) in order to lower the vessel in the water so that the shore cranes could continue to discharge cargo.

On the morning of April 12, 1966, as discharge continued, it was noted that some cargo in the vessel's No. 5 hold in the

area of the bilge pipe was wet. A survey was conducted and it was ascertained that water pumped into the bottom tanks (ballast tanks) on the previous day had backed up into the No. 5 hold through a break in a bilge line which passed through the bottom tank which had been flooded.

From February 23, 1966 until March 17, 1966, immediately before taking on the cargo in question, the KLAUS OLDENDORFF lay in drydock at a shipyard at Hamburg, Germany. During this period the vessel underwent its classification survey which takes place once every four years. Among the various parts of the vessel inspected were the bilge lines. These bilge lines run from the floor of the holds through the bottom tanks to the vessel's bilges. The bilge lines in each hold were separately pressure tested. The pressure test was conducted by sealing off the respective bilge lines and then from the vessel's engine room pumping water into the line under pressure. A constant pressure is then maintained on the particular bilge line for a period of forty-five minutes. If there is a leak in the line, the pressure guage will indicate it. After pressure-testing the bilge lines, the bottom-tanks, through which the bilge lines passed, were "pressed," that is to say, the bottom tanks were filled with water under pressure. If there is a leak in the bilge line passing through the tank being pressed the water will pass into the bilge line and back up in the vessel's holds. No leak in this particular bilge line was found either as a result of the pressure test of the bilge line itself or the "pressing" of the tank through which that bilge line ran. In addition to these two tests, the vessel's bilge lines were hammertested at various points where they passed through the bottom-tanks. From March 11, 1966 to March 17, 1966 while this inspection and repair work was being conducted, the charterer had on board the vessel its own surveyor, Captain K. Lilleike. Captain Lilleike was apparently retained by charterers to inspect the vessel's holds following the work and tests being performed to see that they were in proper

condition to receive cargo. Under date of March 21, 1966, Captain Lilleike reported to chargerers that the vessel's holds were fit to load and carry a cargo of potassium. From the Hamburg shipyard, the KLAUS OLDENDORFF moved to her loading berth at Bremen. During the short voyage from Hamburg to Bremen, the master again "pressed" the bottom-tanks. [Flooded them with water under pressure] Upon arrival at Hamburg, the holds were inspected by the vessel's master who found no evidence of water in the No. 5 hold. During loading at Hamburg the bottom-tanks were pumped dry and were not refilled until April 11, 1966 at Wilmington, North Carolina. As aforestated, KLAUS OLDENDORFF sailed from Bremen, Germany on March 22, 1966 bound for Wilmington, North Carolina. The voyage across the Atlantic took sixteen days and was frought with heavy seas and violent winds. The vessel's master described the weather encountered in crossing as "heavy weather with white squalls of hurricane force." In this weather the vessel "laboured extremely hard and was extremely strained in her structures. . ." So severe was the weather encountered that ventilators on deck were torn away and even a steel deck beam on the forecastle was broken. At times the vibration was so great when the vessel pounded upon coming off a wave that cups on the dining tables were flung to the ceiling.

QUESTION PRESENTED

ON APPEAL SHOULD DISTRICT COURTS DECISION IN CARGO CASE RELATIVE TO WHETHER SHIPOWNER EXERCISED DUE DILIGENCE IN MAKING VESSEL SEAWORTHY BE TREATED AS A QUESTION OF FACT OR SHOULD IT BE TREATED AS A QUESTION OF LAW.

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* This pressure test was at 6-½ Kilograms per square centimeter which was more than twice the normal pressure used in such pressure tests.

REASON FOR GRANTING THE WRIT

The decision of the Fourth Circuit Court of Appeals in this case is in direct conflict with the decision of the Second Circuit Court of Appeals in the case of *Continental Insurance Company* v. *United States*, 2 cir., 195 F 2d 527.

The question presented to the District Court in this case was whether or not a shipowner had exercised due diligence in making his vessel seaworthy before commencement of a voyage on which cargo was damaged. The District Court, sitting in admiralty, without a jury found from the factual evidence presented that the shipowner had failed to exercise due diligence. The decision of the District Court was appealed to the Fourth Circuit Court of Appeals and there again the question was whether the shipowner had exercised due diligence to make his vessel seaworthy before commencement of the voyage. The shipowner argued that the evidence clearly indicated that he had used due diligence. The Appellate Court in its opinion stated that a "rather close case" was presented by the evidence. However, the appellate Court said that it could not disturb the District Court's findings on the question of exercise of due diligence unless they were clearly erroneous, citing *McAllister* v. *United States*, 348 U.S. 19, 20 (1954).

What the Appellate Court did was to simply state that the question of "due diligence" was a factual question which it could not disturb on appeal unless clearly erroneous.

This holding is in direct conflict with the holding of the Second Circuit Court of Appeals in *Continental Insurance Company* v. *United States*, 2 Cir., 195 F 2d 527 where in response to a similar question that august body stated at page 528:

> "There is no dispute of fact: i.e., as to what the actual test was of the discharge assemblies at Baltimore; the only question is whether that test constituted "due diligence;" and that issue is not of fact, for it involves setting the standard of care which the situation demanded. Although it is left to juries in actions tried by a jury, upon appeal from the decision of a judge we treat it as a question of law."

The conflict between these two circuits on this most important question is clear. The Second Circuit says plainly that the question of "due diligence" when appealed from the decision of a judge is to be treated by the appellate court as a question of law. On the other hand, the Second Circuit says that this identical question on appeal from the decision of a judge is to be treated as a question of fact.

An obvious conflict existing between circuits on this most important question certiorari should be granted.

CONCLUSION

The decision of the Fourth Circuit in this case is in direct conflict with the decision of the Second Circuit in *Continental Insurance Company* vs. *United States* 195 F 2d 527.

The question presented is an important one which should be settled in order that there will be consistancy amongst the various circuits.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

POTASH IMPORT AND CHEMICAL CO.,)

Plaintiff,

v.

M/S KLAUS OLDENDORFF, her engines, boilers, etc., in rem, and EGON OLDENDORFF, in personam,

Civil Action No. 5835

Defendants.

MEMORANDUM ORDER

Plaintiff, a United States importer of potash, entered into a charter agreement with defendant, Egon Oldendorff, to carry products from Germany to the United States in the M/S KLAUS OLDENDORFF. On March 22, 1966, the ship completed receiving the cargo of potash in good condition, the master accepting the cargo without exceptions. The vessel thereafter commenced its trip to the United States and while making the crossing encountered heavy Spring seas. Upon arrival at Wilmington, North Carolina, the master filed a heavy weather report and requested a marine cargo surveyor to examine the cargo. The examination was made on April 7, 1966, and the cargo found to be dry. However, there was some damage to attachments of the vessel on deck. Unloading of the cargo commenced and as the unloading proceeded, the ship rose in the water making it difficult for the dockside

cranes' clam buckets to complete the unloading. Upon request of the stevedores and upon the master's orders, ballast was pumped into the tanks of the vessel to lower it in the water, thus permitting the dockside cranes to continue their unloading operations with the clam buckets.

On April 12, 1966, seawater was found in the No. 5 hold, which had damaged some of the potash. A marine survey was ordered. It was determined that 912,200 pounds of sulphur of phosphate – about one-third of the total sulphur of phosphate cargo – was damaged. After the entire cargo, including the damaged portion, was removed from the vessel and the ballast tanks pumped, marine surveyors made a survey of the ve[redacted]. Entering the manhole to the starboard wing tank they found a rupture in the bilge suction line pipe to No. 5 hold. The pipe was about 3-1/2 inches in diameter, and the hole found was described as 2-1/2 inches by 2 inches. Pieces of rusted material were taken from the hole in the pipe and are plaintiffs exhibits No. 6 and No. 7. The hole was described as approximately one to five inches from the baffle plate. Inspector Ward testified that it was generally noted and agreed by all present "that the material was soft and had deteriorated along the edges" – "the material was crumbly and soft on the inner side."

The evidence established that when water was pumped into the starboard wing tank and reached the level of the bilge line pipe running to the bilge well in hold No. 5, through the wing tank, the water from the wing tank entered the hole in the pipe and flowed into the bilge well in hold No. 5 and then into hold No. 5. Had the hole not been in the bilge pipe, the water would have remained in the wing tank.

On February 23, 1966, the ship entered a shipyard in Hamburg, Germany for reclassification tests and maintenance work. It remained in the shipyard until approximately March 17, 1966. During this period the shipyard employees testified

that the bilge lines of each hold were separtely pressure tested, the wing tanks were pressured and the pipes were partially hammer tested. Some of the pipes were tested hydraulically. On March 17, 1966, the vessel left the shipyard on a post-reclassification shakedown cruise from Hamburg to Bremen, where the vessel would load the potash. Upon reaching Bremen the holds were inspected and found dry and certified as being in unobjectionable condition for carrying potash. This certificate went to the seaworthiness of the holds and not the bilge line.

The damaged pipe in question was repaired by removing the faulty portion of the pipe. This was done while the vessel was in transit from Wilmington, North Carolina, to Norfolk, Virginia, and the piece of pipe with the hole in it was disposed of or, in any event, not available for subsequent inspection. The master explained this by saying a marine survey had been made while the vessel was at Wilmington and he saw no necessity for keeping the pipe.

The triable issue in this case as set out in the final pre-trial order, agreed to by the parties, was whether defendant exercised due diligence to make the M/S KLAUS OLDEN-DORFF seaworthy for the voyage in question.

The vessel entered the shipyard for a reclassification test and maintenance work just prior to the charter trip. This, defendant alleges, was an exercise of due diligence to make the ship seaworthy.

Defendant says that the ship encountered foul weather in making the crossing from Bremen to the United States, and as a result the hole developed in the bilge line pipe, which caused the damage to the cargo. Marine Surveyor Johnson, employed by the defendant to make a survey, testified the hole "probably developed during the heavy weather and the

working of the vessel." He further said the metal around the hole was soft and apparently had deteriorated, and that the soft and deteriorated condition of the pipe was not caused in a matter of the several days in transit, but that the pipe had been in a deteriorated condition for some time and was not something that was immediately created. He said, "[I]t was probably the rough weather if the pipe hadn't been deteriorated to some extent." But the evidence is overwhelming that the pipe had deteriorated. Defendant's witness Borstling, who supervised the work at the shipyard, testified that inasmuch as the pipe in question "mainly lie dry" corrosion from the inside is impossible. Since the evidence establishes there was corrosion of the pipe, from his testimony, it must have been on the outside. Hans Heinrich Hamann, cargo expert of Germany, testified that the strain of foul weather if it damaged the pipes, would cause a "crack" in the pipe, not a "hole" and that the damage was more probably due to corrosion and not heavy weather. Likewise, Marine Surveyor Ward testified it was highly improbable the heavy weather caused the hole to appear in the pipe. The captain of the ship testified that during his three years on the ship in question in the North Atlantic he had "very often encountered heavy and still worse weather," and that there was no "damage or inrush of water on board this vessel" during those storms.

The defendant was "bound, before and at the beginning of the voyage, to exercise due diligence to –

(a) make the ship seaworthy;

(b) make the holds – – in which goods are carried, fit and safe for their reception, carriage and preservation"[1]

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1 46 U.S.C. §1303.

Defendants are not liable for loss or damage arising or resulting from unseaworthiness unless caused by want of "due diligence" to make the ship seaworthy, and to make the holds in which goods are carried fit and safe for reception and preservation.[2] When loss or damage had resulted from unseaworthiness, "the burden of proving the exercise of due diligence shall be on the carrier."[3] But, the carrier or ship are not responsible for loss or damage arising or resulting from "[P]erils, dangers and accidents of the sea," and "[L]atent defects not discoverable by due diligence."[4]

Whether the weather conditions encountered by defendant constituted such "perils of the sea" as to relieve defendant from liability, is a question of fact. "Perils of the sea" mean those perils which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence.[5] Defendant cannot escape liability merely by offering evidence the vessel encountered heavy seas and high winds "if the weather encountered might reasonably have been anticipated and could have been withstood by a seaworthy vessel."[6] There is little evidence as to the severity of

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2 46 U.S.C. 1304(1)

3 46 U.S.C. 1304(1)

4 46 U.S.C. 1304(2)(c)(p)

5 *R. T. Jones Lumber Co. v. Roen Steamship Co.*, 270 F. 2d 456 (2d Cir. 1959), where ship encountered bad weather on Lake Erie, seas 12 to 15 feet high and wind reached gale velocity of 50 miles an hour, loss not due to "perils of sea" on basis of finding that storm was not an unusual event for Lake Erie in November, but one which could reasonably be anticipated and provided against.

6 *Artemis Maritime Co. v. Southwestern Sugar*, 189 F. 2d 488, 491 (4th Cir. 1951).

the storm. The wind velocity and wave action are not described. The weather was no worse than was to be expected in such waters at the time. The captain had "very often encountered heavy and still worse weather," aboard this same ship in the last few years.[7] In *John Penny & Sons v. M/V SWIVEL*, 266 F.Supp. 302, 308 (D.C. Mass. 1967), the Court recited that in the case of *Middle East Agency v. The John B. Waterman*, 86 F.Supp. 487, winds reported with a force of 9 and 10 on the Beaufort scale with very heavy seas should have been anticipated during March in the North Atlantic, and that therefore there was "no indication the vessel was subjected to conditions that should not have been anticipated." [cases there cited]. To the same effect is *Continex, Inc. v. The Flying Independent*, 106 F. Supp. 319, where the wind was reported as high as 10 on the Beaufort scale and heavy seas, and where deck cargo was swept over and one life boat cover was torn off.

The weather as reported was to be expected in the crossing and did not constitute a peril of the sea under the facts of this case. The weather did not damage the cargo. It is asking too much to ask the Court to believe that the evidence establishes that a hole in a pipe 2-1/2 inches by 2 inches located in the ballast tank was caused by the toss and roll of the vessel, where there was no water in the pipe line or in the ballast tank. See also *Freedman & Slater, Inc. v. M. V. TOFEVO*, 222 F. Supp. 964 (D.C. N.Y. 1963); *The Giulia*

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7 See similar statements in *John Penny & Sons v. M/V SWIVEL*, 266 F. Supp. 302, 308 (D.C. Mass. 1967), where captain stated conditions were no more severe than had been encountered before; *Continex, Inc. v. The Flying Independent*, 106 F. Supp. 319, 322, where the chief mate said weather was no different then he had experienced "more times than he could recall." In this case wind registered up to 10 on Beaufort scale.

218 F. 744, 746 (2d Cir. 1914); *New Rotterdam Insurance Co. v. SS LOPPERSUM*, 215 F. Supp. 563 (D.C. N.Y. 1963).

Has defendant carried the burden of establishing that it used due diligence to make the ship seaworthy, or to establish that the damage was caused by a latent defect? [46 U.S.C. § 1304].

Turning first to the question of latent defect, in *Waterman SS Corp. v. United States Smelting, etc.*, 155 F.2d 687, 691 (5th Cir. 1946), the Court quoted the definition from The Bill, D.C. Md. 1942, 47 F. Supp. 969, 978, affirmed *Lorentzen v. Brazil Oiticica, Inc.*, 145 F.2d 470 (4th Cir. 1944), "[A] latent defect is one that could not be discovered by any known and customary test." The Court in the Waterman case continued

> A true latent defect is not a gradual deterioration but is a defect in the metal. The ship owner has the burden of showing that the latent defect was not discoverable.

In *The Plow City*, 122 F.2d 816 (3d Cir. 1941), the sounding pipe cap of the No. 1 sounding pipe within the mast stand was missing, permitting water to enter the ship. The ship contended the cap was dislodged by the "unusually strong winds and rough seas, which caused her to roll heavily and labor greatly, so that her decks were constantly awash." There was evidence that the threads on the pipe and the sounding cap were defective, to that the cap was dislodged by the pitching of the ship. The Court said that if the defective condition existed at all, it must have existed before the ship left its port and before encountering the storm. Here, as there, the condition of the pipe cannot be attributed to the perils of the sea. Defendant has failed in its burden of proof, and cannot avail itself of the provisions of the statute. Defendant

did not produce in evidence the piece of pipe with the hole in it. It was replaced while the ship was in transit from Wilmington. The captain did not know what happened to it. From what has been said, it probably would have shown there was no latent defect. The failure to produce it is the fault of defendant. It probably, under the circumstances, gives rise to the inference that it would not show a latent defect, but we need not draw that inference, since defendant has not carried its burden of showing the alleged defect was not discoverable. *Waterman SS Corp.* v. *United States Smelting, etc.*, supra.

In *Hampton Roads Carriers, Inc.* v. *Allied Chemical Corp.*, 329 F.2d 387, 390 (4th Cir. 1964), the Court set out the test for seaworthiness –

> "The test of unseaworthiness", it was said in The Silvia, 171 U.S. 462, 19 S.Ct. 7, 43 L.Ed. 241 (1898), "is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport". The Southwark, 191 U.S. 1, 9, 24 S. Ct. 1, 48 L.Ed. 65 (1903); Bank Line v. Porter, 25 F.2d 843 (4 Cir.), cert. denied, 278 U.S. 623, 49 S.Ct. 25, 73 L.Ed. 544 (1928).

See also *R. T. Jones Lumber Co.* v. *Roen Steamship Co.*, 270 F. 2d 456, 458 (2d Cir. 1959).

The following from *Artemis Maritime Co.* v. *Southwestern Sugar, etc.*, 189 F.2d 488, 492 (4th Cir. 1951), is particularly applicable here:

> Clearly the duty of the ship owner here is nondelegable. Huilever, S.A. Division Huileries Du Congo Belge v. The Otho, D.C., 49 F.Supp 945, 947, Id., 2 Cir., 139 F.2d 748, 750; The Bill, D.C., 47 F.Supp. 969;

Philippine Refining Corporation v. United States, D.C., 29 F.2d 134, Id., D.C., 33 F.2d 974, Id., 2 Cir., 41 F.2d 1010. While various precautions have some evidentiary value, neither "visual inspection", Ore Steamship Corp. v. D/S. A/S. Hassel (The Cypria), 2 Cir., 137 F.2d 326, nor inspection of hull and machinery of the vessel, The Vizcaya, D.C., 63 F.Supp. 898, nor "diligence in the acquisition of seaworthiness certificates", The Folmina, 212 U.S. 354, 29 S.Ct. 363, 53 L.Ed. 546; The Abbazia, D.C., 127 F.495, is conclusive as to the fulfillment by the vessel owner of his duty to exercise the requisite care. Bank Line v. Porter, 4 Cir., 25 F.2d 843. All the testimony, and all the surrounding facts and circumstances, must be considered.

It will be seen from the above cited cases, the furnishing of a certificate by survey of German Lloyd is not conclusive, nor is the inspection by the shipyard. The facts of each case must be considered in the light of all the circumstances.

The burden of proof was on the defendant to establish seaworthiness or the exercise of due diligence, and doubtful issues must be resolved in favor of the plaintiff. *Commercial Molasses Corp. v. New York Tank Barge*, 314 U.S. 104, *Schnell, et al v. The Vallescura*, 293 U.S. 296.

Defendant says the failure of plaintiff to call as a witness a surveyor who went aboard the defendant's vessel before it was loaded, to inspect the holds of the vessel, raises an inference that his testimony would be prejudicial. *Blow v. Compagnie Maritime Belge v. Old Dominion Stevedoring Corp.*, No. 11,186 decided May 7, 1968, 4th Cir. A report of that surveyor was made a part of the deposition of witness Holzkaemper. It shows the surveyor's sole purpose was to ascertain the cleanliness of the vessel's holds. Since the report is

clear, and his survey is not in issue, there was no reason to call this witness. No inference arises from a failure to call him. But, even if it did, it would not establish defendant's defense.

Defendant having failed to carry its burden, plaintiff is entitled to recover.

There is no dispute in the evidence of the amount of damage. It clearly appears the reasonable value of the cargo in question, undamaged, was $57,208.34, less $140.95 for normal weight loss (spillage from unloading) or $57,067.39. The damaged cargo was sold for $28,190.90, with a difference or loss of $28,876.64. Expenses incurred in the unloading and handling of the damaged cargo, etc. (above the normal expense of handling the same) was $5,983.75, for a total damage of $34,860.39. Plaintiff is entitled to and is granted judgment for this sum.

Plaintiff moves the Court for an order to require defendant to pay the reasonable expenses incurred in making proof of certain facts which plaintiff requested defendant to admit. In request for admissions numbered 7 through 21, plaintiff asked defendant to admit the facts concerning damages, the amount received upon sale of the damaged cargo, the additional expenses incurred, all of which were itemized in the request for admissions. Defendant's unsworn response denied the request. The proof presented by plaintiff confirmed the figures set out in the request for admissions. There is no dispute as to the cost incurred by plaintiff in making proof. It is $445.71. The facts bring this question within the provisions of Rule 37(c) of the Federal Rules of Civil Procedure. Plaintiff is entitled to recover this sum and judgment is accordingly granted him for $445.71.

/s/ Richard B. Kellam

United States District Judge

Norfolk, Virginia
July 30th, 1968.

a11

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 12,814

Potash Import and Chemical Co.,

Appellee,

versus

M/S KLAUS OLDENDORFF, her engines, boilers, etc., in rem, and Egon Oldendorff, in personam,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

(Argued February 7, 1969. Decided March 4, 1969)

Before BOREMAN, BRYAN and WINTER, Circuit Judges.

Walter B. Martin, Jr., (Vandeventer, Black, Meredith & Martin on brief) for Appellants, and Richard I. Gulick and Charles R. Dalton, Jr., (Seawell, McCoy, Winston & Dalton on brief) for Appellee.

PER CURIAM:

Potash Import and Chemical Co., cargo owner, obtained a judgment in personam against Egon Oldendorff, the shipowner, and a judgment in rem against the vessel KLAUS OLDENDORFF for damages to a portion of a cargo of sulfate of potash in the vessel's No. 5 hold.[1]

The district court found on the evidence that the shipowner failed to use due diligence to make the vessel seaworthy before she commenced a voyage from Germany to the United States. The sole issue on appeal before this court is the correctness of the district court's finding. If "due diligence" was exercised the shipowner is not liable for resulting damage to the cargo since by clause 2 of the charter contract executed by the parties the owner was responsible for loss of or damage to the cargo "* * * only in case the loss * * * [was] caused by improper or negligent stowage of the goods * * * or by personal want of due diligence on the part of the Owners or their manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their manager."

Prior to the voyage the vessel lay in dry dock at a German shipyard during which she underwent general maintenance work and a classification survey which takes place once every four years in order that she could obtain a seaworthy certificate issued by German Lloyd's. Among the various parts of the vessel inspected were the bilge pipes which run from the floor of the holds through the ballast or deep tanks to the bilges. The bilge pipes in each hold were subjected

[1] The damage to the cargo occurred as a result of a rupture in the bilge pipe. During the unloading operation it was necessary to lower the vessel in the water so as to permit dockside cranes to reach the cargo. When water was pumped into the vessel's lower ballast tanks water entered the No. 5 hold through the ruptured bilge pipe.

to testing, including a hammer test and a test under sustained hydraulic pressure. No leaks were discovered. After pressure testing the bilge pipes, the deep tanks through which the bilge pipes passed were "pressed," that is, the tanks were filled with water under pressure. It was testified that if there was a leak in the bilge pipe passing through the tank being "pressed" water would pass into the bilge pipe and through it into the vessel's hold.

During the movement of the vessel from the shipyard at Hamburg to her loading pier at Bremen the master again "pressed" the bottom tanks. Prior to the loading of cargo the vessel's master inspected the holds and found no evidence of water in the No. 5 hold.

The district court found that the owner had failed to exercise due diligence to make the vessel in all respects seaworthy. The bilge pipe in the area of the rupture was found to be excessively corroded and in a deteriorated condition. An egg-shaped hole approximately two and one-half inches by two inches in size was found in the offending bilge pipe and the metal around the edges of the hole was soft and crumbly. In addition it was shown that the ruptured pipe had been in use for a period beyond and in excess of its normal service life and that the rupture occurred in a low section which was more susceptible to corrosion than other portions of the pipe; that there were no check or non-return valves at the bilge suctions in the holds to insure watertight integrity as against potential leaks from that portion of the bilge piping passing through saltwater-carrying deep tanks.

A rather close case is presented by the evidence. However, the district court's findings are not to be disturbed unless they are clearly erroneous. Rule 52(a) Fed.R.Civ.P. On the entire evidence in the instant case we are not left with "the definite and firm conviction that a mistake has been

committed." *McAllister v. United States*, 348 U.S. 19, 20 (1954). We cannot say that the district court's finding of lack of due diligence is clearly erroneous.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 12,814

Potash Import and Chemical Co.,

Appellee,

vs.

M/S KLAUS OLDENDORFF, her engines, boilers, etc., in rem, and Egon Oldendorff, in personam,

Appellant.

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the Petition for Rehearing filed by the shipowner, Egon Oldendorff, it is

ORDERED that said petition be, and the same hereby is, denied.

FILED
Apr 10, 1970
SAMUEL W. PHILLIPS
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United States Circuit Judge

s/ *Albert V. Bryan*
United States Circuit Judge

s/ *Harrison L. Winter*
United States Circuit Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 380

M/S KLAUS OLDENDORFF, her engines, boilers etc., in rem, and
EGON OLDENDORFF, in personam,
Petitioners

vs.

POTASH IMPORT AND CHEMICAL CO.
Respondent

BRIEF OF POTASH IMPORT AND CHEMICAL CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Potash Import and Chemical Co., respectfully requests that this Court deny the Petition of M/S KLAUS OLDENDORFF, her engines, boilers etc., in rem, and Egon Oldendorff for issuance of a Writ of Certiorari to review the Opinion and Final Order of the United States Court of Appeals for the Fourth Circuit entered in this matter on March 4, 1969 and April 10, 1970, respectively.

QUESTION PRESENTED

Should District Court's Decision Determinative As To Whether Shipowner Exercised "Due Diligence" In Making His Vessel Seaworthy With Disputed Facts Pertaining Thereto Be Treated On Appeal As A Question Of Fact Or A Question Of Law?

As the respondent differs with petitioners as to the facts pertinent to this Honorable Court's proper consideration of the Question Presented, we set forth hereinafter the material facts revealed from this record. For convenience, simplicity and uniformity, we shall hereinafter refer to Egon Oldendorff as "shipowner" and Potash Import and Chemical Co. as "Potash."

STATEMENT OF CASE

Shipowner is a citizen of the Federal Republic of West Germany and owner of the M/S KLAUS OLDENDORFF. Potash is an American corporation engaged in the importation of potash in bulk. Shipowner contracted with Potash to carry Charterer's cargo from Germany to the United States aboard the M/S KLAUS OLDENDORFF in the Spring of 1966, a part of which shipment was found, upon delivery, to be in a badly damaged condition.

The KLAUS OLDENDORFF was built in 1958, in Bremerhaven, Germany, and at the time of the damage to the cargo in question in 1966, still had in use her original bilge piping, a portion of which was routed through salt water carrying ballast tanks in the number five (5) hold and elsewhere. This bilge piping was manufactured of galvanized steel 3½ inches in diameter, 5 millimeters in thickness and had no check (non-return) valves at the bilge suctions in the holds to insure watertight integrity insofar as potential leaks from that portion of

piping passing through the ballast or deep tanks. Undisputed testimony reflects that the service life of 3½ inch galvanized steel piping 8 millimeters in thickness is seven (7) to ten (10) years, and that similar piping of 5 millimeters in thickness has a proportionately shorter service life.

Prior to the critical voyage, the KLAUS OLDENDORFF underwent certain general maintenance work and reclassification tests in a shipyard in Hamburg, Germany, in late February and early March of 1966. No specific instructions with regard to testing, maintenance or repair of the bilge piping was given by the shipowner. While shipyard employees testified that the bilge lines in each hold of the vessel were separately pressure tested, the wing tanks pressured, and the pipes partially hammer tested; admitttedly no drill testing or ultrasonic testing of the thickness of the bilge piping was made as performed elsewhere in the trade despite the age of the bilge piping in this ship which had exceeded its life expectancy. Near the end of the KLAUS OLDENDORFF's stay in the shipyard, a cargo surveyor, representing Potash, inspected the vessel's holds for cleanliness *solely* and certified them satisfactory in that inspection for loading of a cargo of potash.

On March 17, 1966, the KLAUS OLDENDORFF proceeded from Hamburg to Bremerhaven where she loaded a cargo of potash in accord with the Charter Agreement. This cargo was in good condition upon loading and no exceptions were noted. While heavy seas were encountered on the crossing to the States, they were no more severe than usual for that time of the year, and the Master noted that the vessel had previously "very often encountered heavy and still worse weather." Additionally, no testimony was offered as to the specific wind velocity.

Because there was some damage to attachments of the vessel above deck, upon her arrival at Wilmington, an examination of the cargo was made by a marine cargo surveyor on April 7, 1966. At that time the potash cargo was found to be dry and unloading was commenced. As the KLAUS OLDENDORFF rose in the water it became difficult for the dockside cranes to complete the discharge and ballast was therefore pumped into her ballast tanks to lower the vessel in the water.

Thereafter, on April 12, 1966, salt water contamination was noted to the sulfate of potash in the number five (5) hold and a survey was initiated to ascertain the cause and extent of the damage. As a result of this survey, an egg-shaped hole, approximately 2½ inches by 2 inches in side, was found in the bilge suction line pipe passing through the wing tank outboard the number five (5) hold of the vessel. The metal around the edges of this hole was soft, crumbly and deteriorated to such an extent as to question the very performance of any tests by the German shipyard and the adequacy thereof.

In view of the location of this rupture, it was apparent to all concerned, including the Master and cargo surveyors, that during the process of ballasting, when water in the starboard wing tank reached the level of the hole in the bilge line pipe, it entered the pipe and flowed through into the bilge well and thence into the number five (5) hold thereby damaging the cargo in question.

During the KLAUS OLDENDORFF's transit from Wilmington to Norfolk, crewmembers of the vessel cut out the section of the pipe containing the rupture and put in a new piece of pipe to effect necessary repairs to the bilge line. However, the Master did not see fit to retain the critical section of removed piping

and the same was not available for further inspection, testing and analysis upon the vessel's arrival at Norfolk or subsequently.

Fortunately, however, one of the cargo surveyors at Wilmington did secure small parts of the deteriorated and crumbly, rusted metal from the edges of the hole in the bilge suction line pipe which was offered as an exhibit at the time of the trial (Plaintiff's Exhibit 6 and 7, Tr. 34-36).

Following the discovery of this damaged cargo at Wilmington, the discharging stevedores removed and segregated the contaminated potash which had previously been stored in the number five (5) hold of the KLAUS OLDENDORFF. This portion of the shipment was surveyed, put out on a competitive bid and disposed of in the usual and customary manner. Undisputed testimony reflected that the total loss to the Charterer sustained due to the damaged potash was the sum of $34,860.39. An additional award of $445.71 was allowed for attorneys' fees and expenses due to the shipowner's arbitrary refusal to admit this damage, where ultimately no dispute was raised in connection with the proof thereof.

ARGUMENT

Notwithstanding the assertions of the petitioners to the contrary, the decision of the Fourth Circuit Court of Appeals in the case at bar is *not* in conflict with the decision of the Second Circuit Court of Appeals in the case of *Continental Insurance Company* v. *United States,* (2nd Cir., 1952) 195 F.2d 527, nor the controlling law of the latter Circuit.

The premise is erroneous that the Second Circuit Court of Appeals in *Continental Insurance Company* (Supra) ruled that *every* review on appeal of the issue of "due diligence" incident to a shipowner's obligation to cargo to make his vessel seaworthy before commencement of the voyage raises *solely* a question of law. The effect of such a ruling would be to limit, if not destroy, the very purpose of Rule 52(a) of the Federal Rules of Civil Procedure in many cases such as the one at bar wherein the trial Court's decision necessarily involved determination of disputed facts relating to the very issue of "due diligence."

In *Continental Insurance Company* (Supra), a test was performed to determine the seaworthiness of discharge assemblies incident to the satisfaction of shipowner's duty to use "due diligence" to make its vessel fit at the commencement of a voyage. There was no dispute of fact as to the appropriateness of the test or its performance. Upon review, the Second Circuit Court of Appeals held in that particular case that a review of a finding of "due diligence" involved solely a matter of law.

Thereafter, however, the Second Circuit Court of Appeals, when faced with the same line of argument as asserted by the petitioners herein in the subsequent case of *Schade* v. *National Surety Corporation* (2nd Cir., 1961) 288 F.2d 106, clearly affirmed that "due diligence" does involve a factual issue subject to the "clearly erroneous" doctrine enunciated by Rule 52(a), F.R.C.P. in those cases wherein there are disputed facts as to the appropriateness of tests and the satisfactory performance thereof conducted incident to the shipowner's obligation to make his vessel fit.

In this latter case, the Second Circuit Court of Appeals stated (Page 107):

> "Appellant argues that this holding is reviewable here as a matter of law, relying on Continental Ins. Co. v. United States, 2 Cir., 195 F.2d 257. We disagree. There the court treated as a question of law the question whether a certain test, conceded to have been conducted, constituted 'due diligence.' Here at issue were questions as to what tests were reasonably required and what tests had in fact been made. These were questions of fact, Huilever, S.A. Division Huileries Du Congo Belge v. The Otho, 2 Cir., 139 F.2d 748; Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., 4 Cir., 189 F.2d 488, 491, as to which the findings were not clearly erroneous."

Similarly, in the case at bar, there was conflicting testimony as to the type of test which should have been performed by the shipyard in order to comply with shipowner's "due diligence" obligation, as well as evidence (Plaintiff's Exhibit 6 and 7; Tr. 34-36) of such extensive deterioration and decay in the tested piping so as to likewise place in factual issue the adequacy and propriety of the very performance of such tests by the German shipyard.

Petitioners raised the same legal premise asserted in this Petition for Certiorari in their earlier Petition for Rehearing before the Appellate Court below, and the Fourth Circuit Court of Appeals in this case, as did the Second Circuit Court of Appeals in the Schade case, rejected the fallacious reasoning that a review of shipowner's "due diligence" obligation on appeal involves a matter of law where there is conflict of fact as to the appropriateness of tests and the performance there-

of used to satisfy shipowner's obligation to make his vessel fit at the commencement of voyage.

CONCLUSION

Therefore, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed and respondent prays that the Writ of Certiorari sought herein be denied.

Respectfully submitted,

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